

## Message Text

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ACTION IO-14

INFO OCT-01 ADP-00 SR-02 ORM-03 DPW-01 ACDA-19 SCS-03

SCA-01 AF-10 ARA-11 EA-11 EUR-25 NEA-10 RSC-01 OIC-04

AID-20 RSR-01 CIAE-00 PM-09 H-02 INR-09 L-03 NSAE-00

NSC-10 PA-03 PRS-01 SS-14 USIA-12 MBFR-03 SAJ-01 /204 W

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R 091750 Z MAR 73

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E. O. 11652: N/ A

TAGS: ICRC, PFOR, MILI

SUBJECT: ICRC CONFERENCE OF EXPERTS ON INTERNATIONAL HUMANITARIAN  
LAW

1. SUMMARY: BEGIN UNCLASSIFIED: CONFERENCE OF APPROXIMATELY THIRY-FIVE EXPERTS FROM TWENTY COUNTRIES MET AT ICRC HEADQUARTERS FROM MARCH 5 THROUGH 9 AND DISCUSSED DRAFT TEXTS PREPARED BY ICRC. DETAILED CONSIDERATION GIVEN TO TEXTS ON NON- INTERNATIONAL ARMED CONFLICTS, WITH BRIEFER CONSIDERATION OF TEXTS ON GUERRILLA FIGHTERS OR RESISTANCE MOVEMENTS, PROTECTION OF CIVILIANS, CIVIL DEFENSE, AND PENAL SANCTIONS IN INTERNATIONAL ARMED CONFLICTS. MOST EXPERTS NOTED MULTIPLE DEFICIENCIES IN DRAFTS, WHICH PARTICULARLY DISTURBING IN VIEW OF SHORT TIME REMAINING BEFORE ICRC MUST CIRCULATE TEXTS FORMALLY TO GOVERNMENTS AS BASIS FOR FEB 1974 DIPLOMATIC CONFERENCE. END UNCLASSIFIED. BEGIN LIMITED OFFICIAL USE: AS RESULT, ICRC IS CONSIDERING DELAYING CONFERENCE TO SUMMER OF 74 OR BREAKING IT INTO TWO SESSIONS, ONE IN FEB AND ONE IN SUMMER. END SUMMARY.

2. GENERAL DISSATISFACTION WITH ICRC DRAFTING WAS APPARENT AT IN-FORMAL WESTERN GROUP MEETING ON MARCH 4, WHICH WAS ATTENDED BY US, UK, FRANCE AND CANADA ( BELGIAN AND NETHERLANDS INVITED BUT UNABLE LIMITED OFFICIAL USE

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TO ATTEND). UK EXPERTS ANNOUNCED THAT THEIR AMB IN GENEVA WOULD DELIVER TO ICRC ON MARCH 5 AN AIDE- MEMOIRE NOTING SERIOUS CONCERNS WITH DEFECTS IN ICRC DRAFTS. IN PRIVATE ORAL PRESENTATION MARCH 6 TO PICTET OF ICRC, UK EXPERTS INDICATED THAT, UNLESS DRAMATIC IMPROVEMENTS MADE IN DRAFTS, UK AND OTHERS WOULD FEEL COMPELLED DEVELOP AND SUBMIT THEIR OWN DRAFTS. UK CONSULTED FULLY WITH USDEL IN ADVANCE OF DEMARCHE, AND WE AGREED WITH ITS SUBSTANCE, ALTHOUGH NOT FULLY WITH THE HARSHNESS OF ITS TONE. WE MADE MUCH THE SAME POINT IN QUIETER WAY IN OUR COMMENTS DURING THE MEETINGS OF EXPERTS AND IN PRIVATE CONVERSATIONS WITH PILLOUD, PICTET, AND ICRC PRESIDENT NAVILLE.

3. MARCH 7 AT ICRC RECEPTION NAVILLE TOOK SOUNDINGS ON WHETHER CURRENT SCHEDULE, WHICH CALLS FOR CIRCULATION OF FINAL DRAFTS BY JULY 1, 1973 AND DIPLOMATIC CONFERENCE FEB 18 TO APR 11, 1974, COULD BE MAINTAINED. USDEL DOES NOT KNOW WHAT VIEWS OF OTHER DELS WERE. WE INDICATED OUR PRIVATE AND PERSONAL VIEW THAT IN VIEW OF CURRENT QUALITY OF DRAFTS, PERHAPS BEST PROCEDURE WOULD BE SHORT, ONE- MONTH SESSION OF DIPLOMATIC CONFERENCE IN FEB 1974 TO REVISE ENTIRETY OF DRAFTS AND PRESENT CLEAR OPTIONS TO GOVTs, WITH LONGER, TWO- MONTH SESSION IN SUMMER OF 1974 FOR FINAL ADOPTION OF TEXTS.  
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4. BEGIN UNCLASSIFIED: ON MARCH 5 CONFERENCE CONSIDERED ARTICLES IN NON- INTERNATIONAL CONFLICTS PROTOCOL ( PROTOCOL II) ON COMBATANTS.

THERE WAS WIDE DISAGREEMENT REGARDING EXTENT TO WHICH RULES RELATING TO METHODS OF COMBAT SHOULD BE INCLUDED IN THIS PROTOCOL. ALL AGREED THAT IT APPROPRIATE TO INCLUDE MINIMAL HUMANITARIAN PROVISIONS PROVIDING THAT CHOICE OF MEANS OF COMBAT NOT UNLIMITED AND WEAPONS CALCULATED TO CAUSE UNNECESSARY SUFFERING FORBIDDEN, AS WELL AS PROVISION ON ADVERSARY HORS DE COMBAT. ASIDE FROM BASIC DIFFERENCES OF PRINCIPLE, MANY DRAFTING CRITICISMS WERE MADE. US, MOST NATO MEMBERS AT CONFERENCE, TWO AFRICAN PARTICIPANTS ( NIGERIA AND CAMEROON) AND INDONESIA TOOK VIEW THAT MORE LIMITED AND PURELY HUMANITARIAN PROTOCOL APPROPRIATE, AND THESE COUNTRIES CONTINUED TO TAKE SIMILAR POSITION RELATING TO OTHER ARTICLES IN PROTOCOL II. OTHER COUNTRIES TENDED TO FAVOR MORE EXTENSIVE PROVISIONS.

5. MARCH 5 AND 6 CONFERENCE CONSIDERED DRAFT ARTICLES IN PROTOCOL II ON PROTECTION OF CIVILIAN POPULATION. BASIC DIFFERENCE AGAIN BETWEEN THOSE WHO FAVORED INCLUDING MOST FUNDAMENTAL HUMANITARIAN  
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PROVISIONS AND THOSE WHO FAVORED MORE EXTENSIVE PROVISIONS.

FORMER

GROUP, IN GENERAL, IN FAVOR OF ARTICLES CONCERNING HUMANE TREATMENT, A DEFINITION OF CIVILIANS AND CIVILIAN POPULATION, BASIC RULE PROHIBITING ATTACK ON CIVILIANS, AND PROVISIONS RELATING TO FORCED MOVEMENT OF CIVILIANS. BEYOND THAT, NO AGREEMENT EMERGED.

6. MARCH 6 CONFERENCE CONSIDERED ARTICLE RELATING TO TREATMENT OF PERSONS WHOSE LIBERTY HAD BEEN RESTRICTED ( PROTOCOL II). THERE BASIC AGREEMENT IN FAVOR OF SUCH ARTICLE. BUT SERIES OF DRAFTING SUGGESTIONS MADE. US AND CERTAIN OTHER DELS RECOMMENDED THAT A DIFFERENTIATION BE MADE BETWEEN CERTAIN MINIMUM GUARANTEES THAT WOULD BE MANDATORY AND SEVERAL OTHER GUARANTEES THAT WOULD APPLY TO THE EXTENT OF THE CAPABILITY OF THE PARTY TO THE CONFLICT.

REGARDING GUARANTEES, SOME DELS FAVORED REFERENCE TO NATIONAL STANDARDS AS MOST REALISTIC WHILE OTHERS BELIEVED INTERNATIONAL MINIMUM STANDARD REQUIRED. REGARDING PARA PROHIBITING " UNLAWFUL" ACTS ENDANGERING DETAINEES, SIGNIFICANT SENTIMENT FAVORED REPLACING WORD UNLAWFUL WITH " UNJUSTIFIED".

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SCA-01 AF-10 ARA-11 EA-11 EUR-25 NEA-10 RSC-01 OIC-04

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7. CONFERENCE TURNED TO ARTICLES ON PENAL PROSECUTION IN PROTOCOL II ON MARCH 6. THERE GENERAL AGREEMENT ON ARTICLE PROHIBITING PUNISHMENT FOR OFFENSE WHICH NOT PERSONALLY COMMITTED AND PROHIBITING

COLLECTIVE PENALTIES. HOWEVER, THERE WAS MORE DISCUSSION OF ARTICLE RELATING TO BASIC JUDICIAL GUARANTEES, RIGHT OF APPEAL, SUSPENSION OF CARRYING OUT DEATH SENTENCE, AND AMNESTY. ASIDE FROM AGREEMENT THAT SENTENCE REFERRING TO GRAVE BREACHES INAPPROPRIATE, NO CONSENSUS EMERGED. ONE MAJOR TOPIC OF DISCUSSION WAS APPLICABILITY OF VARIOUS PROVISIONS IN THIS ARTICLE TO REBELS, I. E., WHETHER REBELS COULD LIVE UP TO STANDARDS. SIMILAR ISSUES CONCERNING ABILITY OF REBELS TO LIVE UP TO VARIOUS PROVISIONS IN PROTOCOL II AROSE IN CONNECTION WITH DISCUSSION OF SEVERAL OTHER ARTICLES.

8. FINAL TOPIC OF DISCUSSION MARCH 6 WAS DRAFT PREAMBLE FOR PROTOCOL II. DISCUSSION RELATIVELY DESULTORY, WITH US ARGUING PREAMBLE SHOULD BE LEFT TO DIPLOMATIC CONFERENCE, IF REQUIRED AT ALL.

9. DISCUSSION OF PROTOCOL II CONCLUDED MARCH 7 WITH REVIEW OF NEW PROPOSAL BY ICRC ON FIELD OF APPLICATION OF PROTOCOL. THIS PROPOSAL, WHICH PROVIDES RELATIVELY LOW THRESHOLD FOR APPLICATION OF PROTOCOL, WAS SAID TO BE ADVANCE OVER PREVIOUS DRAFT, BUT CONTINUED TO ELICIT SIGNIFICANT DISCUSSION. VARIOUS DELEGATES TOOK POSITIONS RANGING FROM ACCEPTANCE OF THE RELATIVELY LOW THRESHOLD SET OUT IN ICRC LIMITED OFFICIAL USE

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DRAFT TO MUCH HIGHER THRESHOLD VERGING ON CLASSIC CIVIL WAR. UNCLEAR RELATION OF SCOPE OF PROTOCOL II TO SCOPE OF COMMON ARTICLE 3 OF GENEVA CONFERENCE WAS SUBJECT OF DISCUSSION.

10. ON MARCH 7 DISCUSSION TURNED TO PROTOCOL ON INTERNATIONAL ARMED CONFLICTS (PROTOCOL I). FIRST ITEM WAS NEW DRAFT CONCERNING RESISTANCE MOVEMENTS (FORMERLY "GUERRILLA FIGHTERS"). PARA 1 OF NEW ARTICLE, STATING CONDITIONS FOR PW TREATMENT FOR GUERRILLAS, GENERALLY ALONG LINES ACCEPTABLE TO US, BUT CONTAINED LARGE NUMBER OF SERIOUS DRAFTING DEFICIENCIES. SOME OTHERS ARGUED THAT NECESSITY FOR BEARING ARMS OPENLY OR DISPLAYING DISTINCTIVE SIGN SHOULD BE ELIMINATED, BUT MOST THOUGHT POSSIBILITY OF DISTINGUISHING COMBATANTS FROM CIVILIAN POPULATION VITAL. SERIOUS DISAGREEMENT EMERGED ON PARA IN ARTICLE CONCERNING MEMBERS OF MOVEMENTS STRUGGLING FOR SELF-DETERMINATION, WITH QUESTION RAISED WHETHER THIS PROVISION INSERTED AS BACKDOOR ATTEMPT TO EXPAND SCOPE OF PROTOCOL TO NON-INTERNATIONAL CONFLICTS. THE SUPERFICIAL NATURE OF PARA CONCERNING INDIVIDUAL BREACHES WAS POINTED OUT.

11. ON MARCH 8 CONFERENCE CONSIDERED REVISED ARTICLES ON CIVILIAN POPULATION (PROTOCOL I). THERE WAS GENERAL DISSATISFACTION WITH QUALITY OF DRAFT ARTICLES PROVIDED. ON SUBSTANCE, US AND SEVERAL OTHERS CRITICIZED TOTAL LACK OF REALISM IN PROPOSALS CONCERNING AREA BOMBARDMENT, PROTECTION OF CIVILIAN OBJECTS, PROTECTION OF OBJECTS INDISPENSABLE TO SURVIVAL OF CIVILIAN POPULATION, AND PRECAUTION WHEN ATTACKING. WE EXPRESSED DISAPPOINTMENT AT POOR

DRAFT ON PROPORTIONALITY. WE SAID WE WOULD SUBMIT WITHIN WEEK OF TWO OUR DETAILED DRAFTING SUGGESTIONS IN MEMORANDUM TO ICRC. OTHER VIEWS RANGED FROM SIMILAR DISENCHANTMENT TO SUPPORT OF WIDE RANGING PROVISIONS PUT FORWARD BY ICRC.

12. MARCH 8 CONFERENCE DISCUSSED ARTICLES ON CIVILIAN DEFENSE (PROTOCOL I). VIEWS REMAIN SIMILAR TO THOSE EXPRESSED AT MAY 1972 CONFERENCE OF GOVERNMENT EXPERTS, BUT EVEN SUPPORTERS OF EXTENSIVE PROVISIONS ON CIVIL DEFENSE ORGANIZATIONS QUESTIONED SOME OF THE FURTHER EXPANSIONS OF THOSE ARTICLES PROPOSED BY ICRC, E. G. ALLOWING INCLUSION OF MILITARY PERSONNEL AND PROVIDING PROTECTION TO CIVILIANS NOT MEMBERS OF ANY ORGANIZATION.

13. MARCH 9 CONFERENCE DISCUSSED PENAL SANCTIONS ARTICLES FOR PROTOCOL I. MANY COMMENTS SHOWED THESE ARTICLES REQUIRED FURTHER THOUGHT. IN OUR VIEW THERE WAS A GENERAL FAILURE OF EXPERTS TO LIMITED OFFICIAL USE

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APPRECIATE SIGNIFICANCE OF EXTENSION OF THE GRAVE BREACH CONCEPT TO ACTS OF COMBAT COMMITTED AGAINST THE ENEMY. US SUGGESTED THAT PERHAPS THESE PROVISIONS NOT NECESSARY AS LONG AS EXISTING PROVISIONS ON BREACHES IN GENEVA CONVENTIONS APPLIED TO PROTOCOL.  
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